Supreme Court, U.S.
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No. 00-309

IN THE

Supreme Court of the United States

SYRACUSE EXPLORATION COMPANY,

Petitioner,

v.

NORTHBROOK PROPERTY & CASUALTY INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States District Court for the Middle District of Pennsylvania ("district court") properly exercise its discretion under Fed. R. Civ. P. 56 by entering partial summary judgment in favor of Respondent Northbrook Property & Casualty Insurance Company ("Northbrook") where Petitioner Syracuse Exploration Company ("Syracuse") failed to proffer admissible evidence to support its claim that it suffered a loss of profits as a result of Northbrook's alleged delay in paying its insurance claim?

2. Did the district court properly exercise its discretion pursuant to Fed. R. Civ. P. 37(b) by striking the report of Syracuse's expert witness where the report was filed more than three months after the applicable deadline for such reports and after the court had heard oral argument on Northbrook's Motion for Partial Summary Judgment?

3. Did the district court properly exercise its discretion in: (a) admitting the testimony of Northbrook's expert witness; and (b) excluding evidence of Northbrook's refusal to renew Syracuse's insurance policy?

4. Did the United States Court of Appeals for the Third Circuit ("Third Circuit") properly review the district court's handling of the jury charges under a plain error standard where Syracuse's counsel did not object or otherwise preserve his right to allege error in the substance of the charges or the procedures by which they were adopted and delivered?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Northbrook Property & Casualty Insurance Company states that it is wholly owned by St. Paul Fire & Marine Insurance Company, a publicly held company.

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STATEMENT OF THE CASE

This diversity action arises out of an insurance claim for fire damage to a drill rig owned by Syracuse and insured by Northbrook. Although Northbrook paid the claim, Syracuse alleged that Northbrook violated the Pennsylvania bad faith statute, which provides as follows:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa. C.S.A. § 8371. Syracuse maintains that Northbrook violated the bad faith statute by unduly delaying the repair of the drill rig and improperly applying depreciation in determining the amount owed under the insurance policy. (*Record, a. 21-25*).[1] Syracuse claimed that it was entitled to recover punitive damages, attorney fees and interest, as well as lost profits allegedly incurred as a result of Northbrook's alleged delay in handling its claim. (*Record, a. 24-25*).

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1. As used in this Brief, the term "Record" shall refer to materials contained in the appellate record filed in the Third Circuit. References to the Appendix to the Petition appear as follows: "*Petition, App.* ___."

After the close of discovery, Northbrook filed a Motion for Partial Summary Judgment as to the depreciation and lost profits aspects of Syracuse's claim. (*Record, a. 242*). One week after the hearing on that motion, and nearly four months after the July 1, 1998 deadline for submission of its expert disclosure, Syracuse served upon Northbrook the report of its previously undisclosed expert witness, Emil Toften. (*Record, a. 10; a. 344-360*). Northbrook moved to strike Mr. Toften's report as untimely and in violation of the Court's Pretrial Scheduling Order. (*Record, a. 373*).

On October 22, 1998, Magistrate Judge Smyser issued a Report and Recommendation recommending that the district court grant Northbrook's Motion for Partial Summary Judgment. (*Record, a. 361-370*). The district court adopted the Report and Recommendation by Order dated December 31, 1998. (*Record, a. 381-83*). In its Order, the district court observed that Syracuse failed to present any evidence to support its claim for lost profits. (*Record, a. 381-83*). The district court also struck the report of Syracuse's expert and directed Syracuse to pay Northbrook the reasonable costs it incurred in connection with its motion to strike. (*Record, a. 383*).

By Order dated June 3, 1999, the district court granted Northbrook's motions *in limine* to exclude evidence pertaining to Syracuse's claim for lost profits and evidence of Northbrook's decision not to renew Syracuse's insurance policy. (*Record, a. 463*).

During trial, the district court admitted the testimony of Northbrook's expert witness, Allan Windt, over the objection of Syracuse's counsel. (*Record, a. 872*).

At the close of the evidence on June 8, 1999, the district court judge informed counsel that he would not conduct a charge conference and would issue his own charge concerning Pennsylvania insurance bad faith law. (*Record, a. 924*). Counsel for Syracuse did not ask the district court for a ruling on any of its proposed jury charges, nor did he inform the court of his contention that the failure to rule on the proposed charges was improper. (*Record, a. 924-927*).

The district court charged the jury on the morning of June 9, 1999. After the charge was given, counsel were invited to note their objections to the jury charges on the record. (*Record, a. 924*). Counsel for Syracuse did not state a single objection. (*Record, a. 924*).

The jury returned a defense verdict on June 9, 1999. (*Record, a. 1109*). On June 11, 1999, Syracuse filed a Motion for a New Trial charging that the district court committed numerous errors in ruling on motions *in limine*, admitting and excluding certain evidence at trial, and instructing the jury. (*Record, a. 1112*). The district court denied the Motion for New Trial. (*Record, a. 1119-1130*).

Syracuse appealed the district court's Orders granting partial summary judgment in favor of Northbrook, granting Northbrook's motions *in limine*, and denying Syracuse's Motion for New Trial. By Order dated May 26, 2000, the Third Circuit affirmed the district court's rulings. (*Petition, App. 2a*).

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

The writ of certiorari is granted sparingly, and is ordinarily reserved for those cases which raise novel or extraordinarily compelling questions of law. The Court should deny Syracuse's Petition because none of the procedural mistakes or errors of law asserted in the Petition is so compelling as to merit this Court's review.

Contrary to Syracuse's characterization of the record, the Third Circuit's affirmance of the district court's judgments does not create a conflict among the circuits on any issue of law. Nor does this case implicate rights under the Constitution or federal law. Indeed, the impact of the Third Circuit's decision will be felt by no one other than the parties. In essence, the Petition is nothing more than a final attempt to obtain further appellate review of decisions which are addressed to the sound discretion of the district court. By this petition, Syracuse asks the Supreme Court to substitute its own judgment for that of the district court which heard the evidence, saw the witnesses, and was in the best position to evaluate the case.

I. The Petition Should be Denied Because the Errors Asserted in the Petition Implicate the District Court and Third Circuit's Discretion in Applying Properly Stated Rules of Law.

Syracuse argues that the Third Circuit should have reversed the district court's judgments because: (i) the district court improperly handled the procedure for charging the jury and failed to issue several charges proposed by Syracuse; (ii) the district court improperly excluded the testimony of

Syracuse's expert witness; (iii) the district court erroneously excluded evidence of Northbrook's refusal to renew Syracuse's insurance policy; and (iv) the district court erroneously excluded evidence of the potential profits and business opportunities Syracuse claims to have lost as a consequence of Northbrook's bad faith handling of its insurance claim by entering partial summary judgment in favor of Northbrook. *(Petition at 7-10)*. Each of these alleged errors implicates the district court's exercise of discretion, and the Third Circuit's affirmation of the propriety of that exercise of discretion, in applying settled rules of law. These rules are derived in some cases from the Federal Rules of Evidence and Federal Rules of Civil Procedure, and in other cases from federal common law as developed in the Third Circuit. Supreme Court Rule 10 discourages granting a petition for the writ of certiorari "when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Supreme Court Rule 10*. This Court should make no exception in this case.

A. The Third Circuit Properly Applied the "Plain Error" Standard in Reviewing the District Court's Handling of the Jury Charge.

Syracuse maintains that the Third Circuit erred by "affirming the trial court's failure" to: (i) hold a jury charge conference; (ii) formally rule on the parties' proposed jury charges; and (iii) issue certain jury charges proposed by Syracuse. *Petition* at 8-9. As both the district court and Third Circuit noted in their respective Memoranda, however, Syracuse's counsel was required to, but did not, object to any aspect of the district court's handling of the jury charge. (*Petition, App. 13a-14a; 22a*). Since Syracuse's counsel did not give the District court an opportunity to correct any of

the alleged errors in its handling of the jury charges, the Third Circuit was required to review the procedure and substance of the charges only for "plain error," and to determine whether any of the errors asserted by Syracuse was fundamental and highly prejudicial. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981). Applying that exacting standard to the facts and circumstances of the case, the Third Circuit concluded that Syracuse's allegations of error "lack merit and do not warrant the grant of a new trial." (*Petition, App. 14a*). The Third Circuit's ruling was consistent with the sound exercise of its judicial discretion, and it should not be disturbed.

Syracuse's contention that its counsel had no duty to "specifically object or take exceptions to" the district court's conduct relative to the jury charges" (*Petition at 13*) is contrary to law. As this Court ruled in *United States v. Socony-Vacuum Oil Co.*, a party "cannot as a rule remain silent, interpose no objections, and after the verdict has been returned, seize for the first time on the point that the comments to the jury were prejudicial." 310 U.S. 150, 238-239 (1940).

B. This Court Should Not Review The Third Circuit's Decision Affirming the District Court Order of Sanctions Imposed on Syracuse Based on Syracuse's Untimely Filing of its Expert's Report.

By Order dated October 22, 1998, the district court struck the report of Syracuse's expert witness as a sanction for Syracuse's filing said report three and one-half months after the deadline established in the district court's pretrial scheduling order. (*Petition, App. 19a*). Syracuse challenges

that Order, and the Third Circuit's refusal to reverse it, arguing that both courts misapplied the legal standard governing the exclusion of evidence as a sanction for failure to comply with a pretrial order. (*Petition at 15-16*). This is not an appropriate basis for granting the writ of certiorari.

Fed. R. Civ. P. 37(b)(2) empowers district courts to sanction a party for failing to comply with a discovery order by "prohibiting that party from introducing designated matters into evidence." Fed. R. Civ. P. 37(b)(2). In the Third Circuit, the decision to impose this sanction is guided by *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 904-05 (3d Cir. 1977), *overruled on other grounds*, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985). In *Meyers*, the Third Circuit articulated the factors that a court must consider in making this decision:

(a) the prejudice or surprise in fact to the party against whom the excluded witness would have testified;

(b) the ability of that party to cure the prejudice;

(c) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;

(d) bad faith or willfulness in failing to comply with the court's order; and

(e) the importance of the evidence.

Id. As the Third Circuit observed in its Memorandum Opinion, no one of the *Meyers* factors is dispositive. (*Petition, App. 9a*).

Both the district court and Third Circuit applied the *Meyers* factors to the circumstances of this case and concluded that exclusion of the testimony of Syracuse's expert was appropriate, especially in light of Syracuse's prior violations of the district court's pretrial scheduling order. (*Petition, App. 8a-10a; 19a-20a*). The Court should decline to grant the writ of certiorari on this basis where Petitioner merely requests it to substitute its judgment for that of the district court and the Third Circuit.

C. This Court Should Not Review The Third Circuit's Ruling Upholding The District Court's Exclusion of Evidence of Northbrook's Decision Not to Renew Syracuse's Insurance Policy.

In its Complaint, Syracuse alleged that Northbrook's refusal to renew Syracuse's insurance policy following the submission of Syracuse's claim for damage to its drill rig was evidence of Northbrook's violation of the Pennsylvania bad faith statute. Prior to trial, the district court granted Northbrook's motion *in limine* to exclude evidence of the non-renewal of the policy, finding such evidence to be irrelevant. (*Record, a. 463*).

The district court's decision to exclude evidence of the non-renewal of Syracuse's insurance policy was consistent with the sound exercise of judicial discretion. In ruling on Northbrook's motion *in limine*, the district court conducted a threshold inquiry under Fed. R. Evid. 401, asking whether evidence of Northbrook's refusal to renew Syracuse's insurance policy had any tendency to prove or disprove the essential question of fact at trial: whether Northbrook's handling of Syracuse's claim was done in bad faith. (*Petition, App. 12a; 17a*). The district court answered

that question in the negative. (*Petition, App. 18a*). Supreme Court Rule 10 counsels against granting a writ of certiorari where, as here, the Petition asks the Supreme Court to substitute its judgment for that of the district court in a matter left to the district court's sound discretion.

Moreover, the district court and Third Circuit properly rejected Syracuse's contention that Northbrook's refusal to renew the policy, standing alone, could constitute bad faith under the Pennsylvania Unfair Insurance Practices Act. (*Petition, App. 12a; 18a*). The district court dismissed each of the foreign decisions cited in Syracuse's Motion for New Trial on the ground that such cases "do not relate to the Pennsylvania bad faith statute or to non-renewal of insurance based on loss history." (*Petition, App. 19a*). The district court also cited four decisions which stand for the proposition that non-renewal of an insurance policy does not constitute bad faith within the meaning of 42 Pa. C.S.A. § 8371. (*Petition, App. 18a-19a*).

Despite the district court and Third Circuit's unambiguous rejection of Syracuse's authority on the non-renewal issue, Syracuse cites those same cases in its Petition, perhaps with the expectation that this Court will adopt a different view of their applicability. The Court should not indulge Syracuse in such an exercise.

D. This Court Should Not Review The District Court's Order Excluding Evidence of Syracuse's Alleged Lost Profits, which was Affirmed by the Third Circuit.

Syracuse's Complaint against Northbrook also alleged that Syracuse suffered a loss of profits and potential business

opportunities as a consequence of Northbrook's handling of Syracuse's insurance claim. After discovery was complete, Northbrook moved for partial summary judgment on the lost profits element of Syracuse's claim, citing Syracuse's inability to prove those damages. (*Record, a. 242*). Northbrook supported its summary judgment with the testimony of its accounting expert, which further undermined the claim of lost profits. Syracuse elected not to submit countervailing expert testimony, relying instead upon the speculative opinions of its officers. (*Record, a. 324-342*).

When confronted with Northbrook's motion for partial summary judgment, the district court's task under Fed. R. Civ. P. 56 was to determine whether Syracuse had adduced admissible evidence sufficient to demonstrate a genuine dispute as to whether Syracuse suffered lost profits or business opportunities as a result of Northbrook's claim handling. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Based on a review of the evidence, and in accordance with his broad discretion under Rule 56, the Magistrate Judge concluded that Syracuse had not met its burden, and entered summary judgment in favor of Northbrook on that issue.

In its Petition, Syracuse asks this Court to "second guess" the Magistrate Judge's application of the Rule 56 standard to the evidence presented by the parties on the lost profits issue. A trial judge's alleged misapplication of established rules of law is not a valid basis for granting the writ of certiorari. Accordingly, the Court should reject Syracuse's Petition.

II. This Court Should Not Review the Third Circuit's Decision Upholding the District Court's Admission of Testimony by Northbrook's Expert because the Lower Court Properly Applied the General Rule Prohibiting Legal Opinion Testimony.

In a transparent effort to manufacture a conflict among the Circuits and thereby peak the Supreme Court's interest, Syracuse argues that the district court and the Third Circuit permitted Northbrook's expert witness, Allan Windt, to explain the law of bad faith to the jury. (*Petition at 7*). Syracuse's characterization of Mr. Windt's testimony is not supported by the record.

As an initial matter, Syracuse's suggestion that Mr. Windt was presented to the jury as a "legal expert" (*Petition, 11a-12a*) is simply false. The District court qualified Mr. Windt to testify as an expert on acceptable claims-handling practices in the insurance industry only after extensive *voir dire* by the Court and by Syracuse's counsel. (*Petition, App. 31a-45a*). As the Third Circuit noted, Mr. Windt "was called to testify in this bad faith action based on his familiarity with acceptable claims-handling standards and practices in the insurance industry," (*Petition, App. 11a*) not because of his knowledge of the law of bad faith.

Moreover, contrary to Syracuse's mischaracterization of the record, Mr. Windt did not testify in the form of an opinion on the law of insurance bad faith. Based on its review of the transcript of Mr. Windt's testimony, the Third Circuit made the following comments:

> We . . . are convinced that the district court was careful to guard against allowing the expert to

> testify to matters reserved for the Court. We agree with the substance of Northbrook's characterization of the expert testimony: "Noticeably absent from [the expert] testimony is any discussion of (or even reference to) the Pennsylvania bad faith statute, the legal standards governing the determination of liability under the statute, a definition of 'bad faith,' or any other matter exclusively within the province of the district court. Indeed, on the one occasion when questioning by Northbrook's counsel arguably invited an opinion regarding the law of bad faith, the district court sustained the objection of Syracuse's counsel and appropriately limited the scope of Northbrook's counsel's inquiry."

(*Petition, App. 11a*).

In summary, there is no support in the record for Syracuse's contention that Mr. Windt was allowed to supplant the trial judge as the expert on the law. Accordingly, Syracuse cannot plausibly argue that the Third Circuit has adopted a rule concerning the admissibility of legal opinion testimony that is contrary to the rule followed in other circuits. Since there is no conflict among the circuits on this evidentiary issue, Syracuse's Petition should be denied.

CONCLUSION

For the foregoing reasons, and because this case presents no issues worthy of Supreme Court review, Respondent Northbrook Property & Casualty Insurance Company respectfully requests that the Court deny the Petition.

Respectfully submitted,

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